Supreme Court, U.S.
FILED
OCT 24 2000
CLERK

(3)

No. 00-239

In The

Supreme Court of the United States

ROBERT R. KRILICH, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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October 23, 2000

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ARGUMENT

In its Opposition, the United States asserts that this Court should not hold the instant petition pending the Court's decision in *Solid Waste Agency* v. *United States Army Corps of Engineers*, No. 99-1178, because there is no "meaningful likelihood" that the Court's decision in *Solid Waste* will affect the proper disposition of this case. Res. Opp. at 6. Respondent is incorrect.

Petitioners maintain that because the EPA did not have the authority under the Clean Water Act and the Commerce Clause to assert jurisdiction over the isolated, intrastate waters on their property – an issue that is squarely presented and will be decided in the *Solid Waste* case – the district court was without subject matter jurisdiction and any orders the court entered were void. The latter proposition is squarely supported by this Court's precedent, but ignored by the court of appeals. See, *e.g.*, *Ex Parte Yarbrough*, 110 U.S. 651, 654 (1884) ("If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged."). Accordingly, the resolution of the *Solid Waste* case clearly will affect the proper disposition of this case.

In response, the United States asserts that any defect in the jurisdiction of the EPA, or the district court, should be overlooked because Petitioners entered into a consent decree. According to the appellate court, "just as a guilty plea (in which the criminal defendant admits – at least implicitly – the connection between his conduct and interstate commerce) forecloses an appellate attack on subject matter jurisdiction, [Petitioners] cannot now assail

the district court's subject matter jurisdiction because [they] entered into a consent decree," which conceded jurisdiction over the controversy. Pet. App. at 8a. Thus, the court of appeals concluded – and Respondent argues – that "the district court had subject matter jurisdiction over the EPA's complaint based on the terms of the consent decree." Res. Opp. at 6. This argument misses the mark.

This Court specifically has held that constitutional challenges are jurisdictional and cannot be waived by consent, even in circumstances where defendant has pleaded guilty. For example, in *Menna* v. *New York*, 423 U.S. 61 (1975), petitioner claimed on appeal that the Constitution precluded the prosecutor "from haling him into court on the charge to which he had pleaded guilty." *Id.* at 62. The appellate court affirmed petitioner's conviction, declining to address the constitutional claim on the ground that the claim had been waived by petitioner's plea of guilty. *Id.* This Court disagreed, holding that "[w]here the [prosecutor] is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Id.* (citing *Blackledge* v. *Perry*, 417 U.S. 21, 30 (1974)). According to the Court, "a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the [prosecutor] may not constitutionally prosecute." *Id.* at 62 n.2. Accordingly, if the Court's holding in the *Solid Waste* case makes clear that the EPA never had jurisdiction to "hale [Petitioners] into court" in a controversy involving isolated, intrastate waters, then the district

court lacked subject matter jurisdiction and any orders it entered – even if pursuant to consent – must be set aside.

Moreover, it would be extraordinarily unfair to let stand a 1992 federal court order that was based on an erroneous, but then prevailing, view of the scope of the EPA's jurisdiction. Petitioners could not reasonably have expected to succeed in challenging EPA's jurisdiction in 1992, when the consent decree was entered, given the state of this Court's Commerce Clause jurisprudence at that time. It was only after this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), that the EPA's assertion of jurisdiction reasonably could be deemed subject to challenge – a challenge that may well be vindicated in this Court's decision in *Solid Waste*. This Court should reject the argument that Petitioners are required to continue to acquiesce in an essentially lawless assertion of jurisdiction over their property.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the petition for a writ of certiorari should be held pending this Court's decision in *Solid Waste Agency* v. *United States Army Corps of Engineers*, No. 99-1178, and then disposed of as appropriate in light of the Court's resolution of that case.

Respectfully submitted,

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